United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig. with affidavit of mailing

74-1176

To be argued by
DAVID A. DEPETRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1176

UNITED STATES OF AMERICA,

Appellee,

—against—

HOWARD FUCHS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

EDWARD JOHN BOYD V,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
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Preliminary Statement

Howard Fuchs appeals from a judgment of conviction following a week long jury trial before the Honorable Jacob Mishler, Chief Judge for the United States District Court for the Eastern District of New York. Appellant was convicted of conspiracy to import and distribute cocaine in violation of 21 United States Code §§ 841(a)(1), 846, 952(a), 960(a)(1) and 963. On February 1, 1974, appellant was sentenced to ten years imprisonment and special parole for a period of five years, and is currently serving his sentence.

Appellant was tried with co-defendant Carlos Trespalacios. The jury acquitted Trespalacios. Two other co-defendants, Michael Arlen and Edward Cohn, pleaded guilty and testified as Government witnesses at the trial. The two remaining defendants named in the indictment, Hemel Pantoja and Juan Gonzalez, are fugitives from justice.

Statement of the Case

Appellant does not challenge the sufficiency of the evidence upon which he was convicted. Instead, appellant challenges the source of that evidence, and the District Court's findings relating thereto. He claims that the evidence offered against him was derived from an illegal wiretap utilized by the District Attorney of Bronx County in a separate, independent investigation into appellant's activities. The District Court considered and rejected appellant's claims and found that the Government's evidence was not the product of the wiretap. The following is an account of the evidence offered against appellant as well as a review of the federal investigation which produced this evidence.

A. The proof upon which appellant was convicted

The Government's proof against appellant showed that appellant was engaged in the business of purchasing substantial wholesale quantities of cocaine for a period of approximately eight months amounting to 60 to 70 kilograms of cocaine. Appellant would then "cut" the cocaine and re-sell it to narcotic traffickers operating in various major cities in the United States. The proof of appellant's narcotic activities rested upon the testimony of three self-confessed co-conspirators who had transacted business with appellant during the eight month period.

The principal witness against appellant was Michael Arlen, a co-defendant who pleaded guilty to the indictment. Arlen testified that he began to purchase cocaine from two Colombians, co-defendants Hemel Pantoja and Juan Gonzalez, in September 1972. In their initial dealings, Arlen purchased cocaine in less than one-half kilo quantities from Pantoja and Gonzalez at Paterson, New Jersey, and resold the cocaine to persons not named in the indictment (T. 39-70).*

* References to "T" are to pages of the trial transcript.

After one month had elapsed, Arlen began to purchase cocaine in larger quantities. Sometime in October 1972, Carol Richner, a co-conspirator not named in the indictment who was a mutual friend of Arlen and appellant, introduced the two men for the purpose of furthering the trafficking of cocaine (T. 71-87, 566-573).

From October 1972 to May 1973, Arlen regularly sold substantial quantities of cocaine to appellant. Arlen testified that three or four times a week he sold kilo quantities of cocaine to appellant, who, in turn, would "cut" the cocaine for resale to various narcotic traffickers, operating in New York City and other major cities in the United States (T. 87-96, 177-266, 330-333).

Edward Cohn, a co-defendant who pleaded guilty to the indictment, was one of the narcotic traffickers who purchased cocaine from appellant. Cohn testified that Arlen had introduced him to appellant in December 1972. Thereafter, Cohn began to purchase cocaine from appellant and resell it in the New York City area. Cohn further testified that on some occasions, he accommodated appellant by receiving the cocaine from Arlen on behalf of appellant (T. 727-789).

From March 1973 until May 1973, Arlen used a limousine service, operated by one David Klein, for his frequent trips to Paterson, New Jersey to purchase the cocaine from Pantoja and Gonzalez. Klein eventually became aware of the purposes of these trips, and thereafter permitted Arlen and appellant to use his apartment for the purpose of storing the cocaine (T. 269-285).

On May 15, 1973, the cocaine operation came to a halt when David Klein was arrested by Special Agents of the U.S. Bureau of Customs for narcotic violations following a brief investigation. Two days earlier, as a result of a routine customs inspection, one Louis Becher was arrested at John F. Kennedy International Airport attempting to

smuggle four and one-half pounds of cocaine into the United States. Becher agreed to cooperate and implicated one Caesar Ramon Torres. The agents arrested Torres, who, in turn, implicated David Klein, as a receiver for the smuggled cocaine (T. 291-292).

While the agents executed the arrest of Klein at his apartment, Arlen unwittingly arrived. The agents searched Arlen and found nothing. Arlen left and reported Klein's arrest to appellant. Both men decided to suspend this particular cocaine operation (T. 330-332).

B. The federal investigation leading to the indictment below

The federal investigation leading to appellant's indictment emanated from the investigation of the smuggling venture that lead to the arrest of David Klein. Approximately two days later, on or about May 17, 1973, the special agent in charge of the smuggling investigation, Gustave Fassler, was advised of the fact that the District Attorney's Office of Bronx County had been conducting an ongoing investigation into narcotic activity and that, as a result of a wiretap utilized in the investigation, had learned of the arrest of Klein (T. 291-293).

This notification was the result of an inquiry made to a Customs liaison officer by a member of the Bronx investigative team. The Bronx investigators had intercepted a telephone conversation between appellant and an attorney, Neil Goldstein, wherein appellant advised Goldstein of Klein's arrest and inquired whether Goldstein would be interested in representing Klein (T. 136-139, 150-151).

Having confirmed the fact that Klein had been arrested by federal agents, the Bronx investigators become concerned that precipitous action by the federal agents might jeopardize the Bronx investigation which had been active since

April 1972. The principal subjects of the Bronx investigation included appellant, Arlen, and Cohn (T. 293-295).

About one week following his arrest, Klein agreed to cooperate with the federal investigation after consulting with his counsel. At this point no information or evidence had been obtained from the Bronx investigation. Klein then implicated appellant, Arlen, Cohn and others in narcotic trafficking and agreed to testify against them (T. 295-297).

Because the paths of both investigations might cross, a meeting was held at the Bronx District Attorney's Office on June 6, 1973. Present were Assistant District Attorney Peter Girshman and members of the Bronx investigating team. Assistant U.S. Attorney David A. DePetris, Special Agent Fassler and the Customs liaison officer, Special Agent Thomas Murphy also attended (T. 139-140, 298).

The Bronx investigators expressed concern that since their investigation had not yet been completed, any arrests of the subjects by federal agents might jeopardize the results sought to be obtained by the Bronx investigation. It was agreed that no federal arrests would take place until after the completion of the Bronx investigation (T. 298-300, 301-302).

There was a discussion at the meeting wherein the Bronx investigators disclosed that they had learned of the Klein arrest as a result of intercepting the Fuchs-Goldstein telephone conversation. Also, the Bronx investigators agreed to furnish the telephone company toll call records for the telephones used by appellant, Arlen, Cohn and others in order to avoid duplicative effort. No other information or evidence was exchanged between the two investigating teams, and the two investigations continued on separate courses independent of each other (T. 140-141, 152, 155-156, 300-301).

In late June 1973, the Bronx investigation resulted in a Grand Jury indictment charging appellant, Arlen, Cohn and others with engaging in a conspiracy and various substantive violations of the state narcotic laws. The state indictment did not charge the conspiracy which was proved at the trial below, but rather dealt with appellant's other narcotic activities (T. 1026-1027, 1056).

Faced with the state indictment and the fact that he was the subject of a pending federal investigation, Arlen, who had previously been convicted of violating federal narcotic laws, decided to cooperate with both federal and state authorities and become a Government witness against appellant, Cohn, Carol Richner, and others (T. 321, 1064-1967).

On November 20, 1973, the federal investigation resulted in the indictment below. The indictment was predicated upon the testimony of Arlen and Carol Richner, who had also agreed to cooperate. Both witnesses implicated appellant before the Grand Jury.

No further information or evidence was obtained from the Bronx investigation except to the extent that the toll call records had been received by the federal investigators as well as a tape of the Fuchs-Goldstein telephone conversation. Neither were introduced in evidence before the Grand Jury or at trial. Nor was any further information or evidence obtained from the Bronx investigation prior to the commencement of the trial below.

ARGUMENT

The District Court properly found that the evidence offered against appellant was not the product of the Bronx County wiretap.

(1)

Appellant argues in his brief that the Government failed to meet its burden of proof for the purpose of establishing that the evidence offered against appellant was not derived from the Bronx County wiretap. Appellant contends that it was the wiretap that lead the federal agents to the identities and subsequent testimony of the witnesses Arlen, Cohn and Richner. A review of the evidence offered at the "taint hearing" demonstrates beyond any doubt that the proof offered against appellant was not the derivative product of the wiretap or the Bronx investigation.

The "taint hearing" was held during the initial stage of the trial as the result of appellant's pre-trial motion for a hearing. The Government called the following witnesses: Vincent A. Montemarano, a New York City Patrolman assigned to the Bronx investigation; Gustave Fassler, the Special Agent in charge of the smuggling investigation; and Thomas Murphy, the Special Agent assigned to act as the liaison officer between the Bronx investigators and federal agents conducting a third and separate investigation centered in California. The defense called no witnesses.

All three witnesses testified that, other than the telephone company toll records and the tape of the Fuchs-Goldstein conversation, no other information or evidence was transmitted to the federal prosecutor and agents conducting the Eastern District investigation. In addition, Agent Fassler testified that prior to receiving any of the above information from the Bronx investigators, David Klein had already implicated appellant, Arlen, Cohn and

others, and was prepared to testify against them. There is nothing in the record to refute Fassler's testimony. Thus, it was Klein, not the wiretap or the Bronx investigation, that lead the federal agents to appellant, Arlen and Cohn.* *See, United States* v. *McCall,* 489 F.2d 359, 363 n. 7 (2d Cir. 1973); *United States* v. *San Martin,* 469 F.2d 5, 8 (2d Cir. 1972), *cert. denied,* 410 U.S. 934 (1973).

Similarly, the eventual testimony of Arlen was not obtained through the wiretap. Arlen's decision to become a witness against appellant cannot be attributed to the wiretap. Following the Bronx indictment, Arlen faced a most difficult situation. As a previously convicted felon of a federal narcotics violation, facing a federal prosecution as well as trial on the state indictment, it is readily understandable that the fear of facing serious charges and substantial imprisonment motivated Arlen to become a Government witness. Moreover, there is nothing in the record to support the theory that it was the wiretap that induced the subsequent testimony given by Arlen against appellant.

Judge Mishler was, therefore, fully supported by the evidence adduced at the hearing to make the following findings of fact (T. 326):

> I find that the investigation in the Eastern District was separate and independent of that being conducted by the District Attorney in the Bronx.
>
> I find that the case against the defendants had proceeded to a point where it was sufficient for grand jury indictment, through the testimony of David Klein.

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* It should also be noted that appellant became the subject of the Bronx investigation well before the installation of the wiretap, as shown by the affidavit submitted for the second wiretap order (App. A.77-A.78).

> Thus far, I find the testimony of Michael Arlen was obtained through his arrest, but he was previously identified by David Klein and in the normal course of events he would have become a government witness; that nothing thus far has been disclosed in the hearing that would in any way indicate that any information obtained by the District Attorney through the wiretaps was used as a source or an aid in obtaining any of the evidence thus far offered.

To hold otherwise would have required a rejection of the testimony of Agent Fassler who testified to Klein's previous identification of appellant, Arlen and Cohn as narcotic traffickers; and the rejection of all three witnesses who testified to the extent of the limited information obtained from the Bronx investigation. There is simply nothing in the record to support such a rejection. Indeed, for the District Judge to have rejected this testimony would have been clearly erroneous and based solely upon speculation and conjecture.

(2)

Appellant also complains about the conduct of the taint hearing in that Chief Judge Mishler refused to permit defense counsel to examine two memoranda produced for the Court's inspection by the Government. Judge Mishler ruled that upon an examination of the two memoranda marked as Government Exhibits 7 and 8, their content bore no relevance to the defense contention, and that the disclosure of the material might prejudice pending narcotic investigations centered in California. The Government submits that a reading of the memoranda supports the finding that they bore no relevance to the taint issue and that, in any event, rather than prejudice appellant, the documents fully support the Government's proof that the evidence offered against appellant was not derived from the Bronx wiretap.

Appellant's counsel in Points I and II of his brief argues at length that the Bronx County wiretap orders were improperly issued by the New York Supreme Court because they were based upon legally insufficient affidavits, and that the execution of the wiretap order was unlawful in that there was no attempt to minimize the scope of intercepted conversations. Judge Mishler found no apparent insufficiency in the affidavits supporting the wiretap order, and found it unnecessary to make a definite finding concerning the execution of the wiretap order in view of his conclusion that the evidence against appellant was not "tainted". For the same reason, and because of the overwhelming proof supporting the finding that the Government's case was not "tainted", the Government respectfully submits that no discussion of Points I and II is required to affirm appellant's conviction below.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

April 24, 1974

EDWARD JOHN BOYD V,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
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Form No. USA-52a-6a
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 24th day of April 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of brief for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Henry B. Rothblatt, Esq.
232 West End Avenue
New York, New York 10023

Sworn to before me this
24th day of April 1974

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 19~~7~~5

Deborah J. Amundsen

Deborah J. Amundsen

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

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United States Attorney,
Attorney for _____

To:

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Attorney for _____

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PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

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_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ _____is hereby admitted.

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